In the

# United States Circuit Court of Appeals

## For the Ninth Circuit

No. 4446

THE UNITED STATES OF AMERICA, upon the Relation of J. L. FINCH, Appellant

vs.

H. S. ELLIOTT, a United States Commissioner for the Western District of Washington, Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

## Brief of Appellee

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### STATEMENT OF THE CASE

On November 25, 1924, the appellant filed in the District Court an amended petition for writ of certiorari, setting out the facts that a search war-

rant had been issued by the United States Commissioner, that the search warrant had been served and executed by prohibition agents of the United States, that certain documents had been taken from the possession of appellant, and prayed as follows:

"Wherefore your relator prays, that a writ issue to the end and purpose that a review of all proceedings had before said respondent in the premises be made, and that a time and place be fixed in said writ for the return of all such proceedings to this court and for a hearing thereon, and that on such hearing such relief be granted as to this court may seem meet and proper in the premises. And your relator further prays that said writ direct and order that pending a hearing on such return all proceedings before the respondent upon such matter be stayed, and further direct that all papers, books, files, letters, receipts, memoranda and other things taken and seized under such search warrant be forthwith delivered up to the Marshal or Clerk of this Court or such other custodian as may be named in said writ so to be impounded until final order be made herein, and further order and restrain that until such final determination be made in the premises, all officers, agents and persons whomsoever into whose hands the said papers, files, memoranda, and other things so taken and seized under such warrant have come desist and refrain from disclosing or in anywise making use of any knowledge, information or thing learned from any examination thereof by them made."

Which petition and prayer was denied by the District Court, upon the ground that it had no jurisdiction.

## ARGUMENT

*The District Court has no inherent power to review the issuance of a search warrant by United States Commissioner.*

The District Court is a creature of the Constitution and laws of Congress and has no power such as is expressly granted, or necessarily implied from the language of the statute creating. The authority to grant a search warrant is found in Section 10496¼-b of the Compiled Statutes of the United States, which is as follows:

"A search warrant authorized by this title may be issued by *a judge of the United States District Court* * * * or by a United States Commissioner * * * ."

The District Court's power and the Commissioner's power to issue a search warrant emanate from a common source, wherein no more power is granted to one than the other to issue a search warrant, and only upon probable cause. In determining whether this court has jurisdiction to entertain this petition and grant a writ of certiorari to the commissioner,

the nature of a writ of certiorari must be fully understood.

"Certiorari: (is) a writ issued by a superior to an inferior court of record, or other tribunal or officer, exercising a *judicial function*, requiring the certification and return to the former of some proceeding then pending, or the record and proceeding in some cause already terminated, in cases where the procedure is not according to the course of common law."

Bouvier's Law Dictionary.

Consequently, it is plain to be seen that the District Court in granting a writ of certiorari, would be undertaking to review the actions of an officer who has as much power as the Judge of this court, in the same instance, and the reviewing of his actions would be merely duplicating the acts of the commissioner. This court under the statute aforesaid would not consider for a moment a similar action brought before one District Judge, to review the acts of another. Why? Because they have the same and equal powers to do the act complained of.

In *United States v. Maresca*, 266 Fed. 722, the court said:

"The general right of this court to issue that writ is recognized in Re Chetwood, 165 U. S. 461; but

if used, there is an implication that it goes to a tribunal, or at least an official, separate from, independent of, and in some way inferior and subordinate to, the issuing court, *unless it be used, as has often been th ease, as an adjunct to some other process, usually habeas corpus.*"

Further, the same court says:

"That a certiorari may issue to an 'inferior court' is undoubted, and the decision in White v. Wagar, 185 Ill. 195, goes upon this ground alone, for by the law of that state it is said, a justice of the peace is 'a court of limited powers.' But it does not follow that a certiorari must issue, and as against a magistrate exercising only the arresting and committing powers, it ought not to issue, and, unless imposed by statute, cannot issue under customary law, as is well and I think conclusively shown by Magie, J., in Farrow v. Springer, 57 N. J. Law 353, 31 Atl. 215. There is no statutory imposition of that remedy by Congress, and therefor in my opinion it does not exist in this matter."

Consequently, it would seem that the only Court having power to review the acts of a commissioner would be an action brought in the Circuit Court of Appeals. In a case well in point, *Farrow v. Springer*, 57 N. J. L. 353, the court said:

"Will the court by writ of certiorari certify a magistrate's proceedings? If it can do so it is conceived that the writ will lie to review any warrant

for assault and battery, or larceny, or other crime charged on oath; and the complaints and warrants, which, by our criminal procedure are to be laid before the grand jury will considered drawn into this court, for there is no perceptible difference between the violation of a man's liberty by his arrest on a criminal charge and the violation of his right of property by a search for goods, the possession of which has been obtained by crime. * * * My *search has not disclosed any trace of the use of the writ of certiorari to remove the warrants of a magistrate in criminal cases or the proceedings thereunder*, prior to the finding of an indictment; and the writ is then obviously used, not for the purpose of review, but to remove the record with the object of proceeding upon it in this court. * * * My conclusion is that a certiorari ought not to be allowed to bring up a warrant of a magistrate issued upon a complaint of a criminal natue. The determination to issue the warrant is not a final determination of the matter put in litigation by such a complaint. Nor can that matter be pursued in this court at that stage of the proceeding, but only before the grand jury of the proper county. If such a warrant has been issued by a magistrate in a matter neither really not colorably within his jurisdiction, the person aggrieved thereby may recover damages from him in a civil action. If the matter be colorably within his jurisdiction the person affected by his action must await the action of the grand jury upon the complaint which gives color to the jurisdiction. The result is that this writ should be dismissed, and no opinion will be expressed as to the sufficiency of the complaint or the correctness of the warrant."

In *Degge v. Hitchcock*, 229 U. S. 170, the Court said:

"The modern decisions cited to sustain the *power* of the court to act in the present case are based on state procedure and statutes that authorize the writ to issue not only to inferior tribunals, boards, assessors and administrative officers, but even to the Chief Executive of a State in proceedings where a quasi-judicial order has been made. *But none of these decisions are in point in a federal jurisdiction where no statute has been passed to enlarge the scope of the writ at common law.*"

If the Commissioner were in any sense a court he would have to be appointed for life, and would have jurisdiction in all matters that the District Court is vested with.

Constitution, Article III, Sec. 1 and 2.

II. *The United States District Court has no authority in law nor inherent power to review the acts of a municipal officer of the Government unless expressly provided by statute.*

The function of a United States Commissioner in issuing a search warrant is a ministerial and not a judicial function.

*Bates v. Payne*, 194 U. S. 106;
*Marquiz v. Frisbie*, 101 U. S. 473;
*Degge v. Hitchcock*, 229 U. S. 162;

*U. S. v. Maresca*, 266 Fed. 723;

*U. S. v. Berry*, 4 Fed. 779;

*The Mary*, 233 Fed. 121;
*U. S. v. Casino*, 286 Fed. 978;

*Todd v. U. S.*, 158 U. S. 278;

*U. S. v. Maresca*, 266 Fed. 723.

In *U. S. v. Maresca, supra*, the court said:

"These considerations also lead to a denial of certiorari, for I do not need to be 'made more certain' of what has been done. Are not all the written records entitled in the court in which I am now sitting? Remember that nothing but an act of Congress can make an inferior court of the United States, *that no act makes a commissioner's court*, and that by tradition an examining and committing magistrate, especially a justice of the peace, holds a court, I am compelled to the conclusion that, when a commissioner issues criminal process, including a search warrant, he does it in and as a part of the proceedings of the District Court."

"* * * But he does the act, not by virtue of any grant of power to the court as such, but by grant directly to him, and it is the same power which is given by the same statutes, and given personally to Justices of the Supreme Court and Circuit and District Judges, each of whom may sit as magistrates, with the same and no other powers."

In *U. S. v. Casino, supra*, Justice Hand, in passing upon a motion for the *return* of property, namely liquor, said:

"It is clear that the owner of property unlawfully seized has, without statute, no summary remedy for a return of his property. * * * In re Chin K. Shue (D. C.), 199 Fed. 282. He may have trespass, or, if there be no statute to the contrary, replevin; but just as in our law no public officer *has any official protection, so no individual has exceptional remedies for abose of power by such officers.* We know no 'administrative law' like that of the Civilians."

In *U. S. v. Berry, supra,* the court said, in speaking of commissioners:

"Indeed, they are not, and under the constitution they cannot be, clothed with judicial power to hear and finally determine any matter *whatsoever.* Their duties relate only to the detention of the accused until the charge against him may be formally presented to the court, and constitutionally tried. In that they are not bound to hear more than the evidence of the government, and they do not finally determine any question touching the guilt or innocence of the accused. *Accordingly, it is said in the books that the function of an examining magistrate is ministerial and not judicial.*"

The Court followed this doctrine in *In Re Mary, supra.* In *Degge v. Hitchcock,* 229 U. S. 171, the court said:

"It is true that the Post Master General gave notice and a hearing to the persons specially to be affected by the order and that in making his rul-

ing, he may be said to have acted in a quasi-judicial capacity. But the statute was passed primarily for the benefit of the public at large and the order was for them and their protection. That fact *gave an administrative quality to the hearing and to the order and was sufficient to prevent it from being subject to review by writ of certiorari.*"

It is to be noted that the power to hear and entertain such matters as were taken up in the *Degge* case, *supra,* were expressly granted by statute, yet the court said:

"The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a *judgment,* it was not subject to appear, writ of error, or *certiorari.*"

III. *Inasmuch as the prohibition agents serving the search warrant upon the appellant are not joined as parties in the above entitled action and were not officers of this court, the court has no jurisdiction to grant the prayer for restraining them.*

*Lewis v. McCarthy,* 274 Fed. 496;
*In re Chin K. Shue,* 199 Fed. 282;
*U. S. v. Hee,* 219 Fed. 1019.

IV. *In issuing a search warrant the commissioner does not act under the instructions of the District*

*Court.* In *In re Chin K. Shue*, 199 Fed. 284, the court said:

"No reason appears for saying that he acts by the court's authority in performing such functions. His authority to perform them comes from the statutes, independently of the court which appointed him."

Judge Neterer, in his opinion in the above entitled case, says:

"The relator invokes the original jurisdiction and 'prays a writ of certiorari,' an order of injunction against persons not parties to this action, and the impounding of papers, etc., seized under a search warrant issued by the respondent, 'a United States Commissioner,' and alleged to be in possession of the parties who executed the warrant.

"Certiorari is a writ having several purposes; one to enable a court of reviewing power to examine the action of an inferior court; another is to enable the Court to get further information in an action then pending before it for adjudication. L. M. A. & C. R. Co. v. L. T. Co., 78 Fed. 659. It is a proceeding appellate in the sense that it involves a limited review of the proceedings of an inferior jurisdiction, Basanat v. City of Jacksonville, 18 Fla. 529; and lies only to inferior courts and officers exercising judicial powers, and is directed to the Court, magistrate, or board exercising such powers, requiring the certification of the record in a matter already terminated. People v. Walter, 68 N. Y.

403; People v. Livingston County, 43 Barb. 232. Its function is not to restrain or prohibit, but to annul. Gault v. City and County of S. F., 122 Cal. 18 (43 Pac. 272). It is a revisory remedy for the correction of errors of law apparent upon the record, and will not lie where there is another remedy except for want of jurisdiction. Farmington River & Water Power Co. v. Co. Commrs., 112 Mass. 206; La Mar v. Co. Commrs., etc., 21 Ala. 772; Thompson v. Reed, 29 Iowa 117; Memphis & C. R. Co. v. Grannum, 11 So. 468 (96 Ala.); McAloon v. License Commrs. etc., 46 Atl. 1047; Saunders v. Sioux City Nursery Co., 24 Pac. 532 (6 Utah). The scope of the writ has been enlarged so as to serve the office of a writ of error. Degge v. Hitchcock, 229 U. S. 162. If this Court has power to issue the writ sought, it obviously could not, in this, an original proceeding against the respondent, 'a United States Commissioner * * *' enjoin strangers to this action, U. S. v. Maresca, 266 Fed. 713, or require parties not before the Court even though the warrant was issued to and executed by them, to surrender and deliver up property taken, nor direct an officer of this court to pursue such parties, and take from their possession documents, evidentiary or otherwise, which may have been wrongfully taken.

"The Court, no doubt, has power to supervise the conduct of its officers—Griffin v. Thompson, 43 U. S. 241—and a United States Commissioner, while not strictly an officer of the court, may to a degree be subject to its supervisory control. U. S. v. Allred, 155 U. S. 591. His powers grew from authority to take oaths and acknowledgments to

that of an examining and committing magistrate—Sec. 1014, Rev. Stats.; U. S. v. Devers, 125 Fed. 778; Todd v. U. S., 158 U. S. 278—and while so acting, discharged judicial functions and had 'no divided responsibility with any other officer of the government,' U. S. v. Schuman, No. 16237 Fed. Cases; U. S. v. Devers, supra. He performed quasi-judicial functions and possessed such powers as were especially conferred. U. S. v. Tom Wah, 160 Fed. 207. He has no power to punish for contempt. Ex perte Perkins, 29 Fed. 900; In Re Perkins, 100 Fed. 950 at 954. The Espionage Act confers special powers in providing for the issuance of search warrants and prescribes the procedure with relation thereto.

Sec. 10496¼-a, Comp. Stats.—'A search warrant * * * may be * * * issued by a judge of the United States District Court or * * * by a United States Commissioner.

"It is obvious that a complete procedure is provided. No supervisory power or appellate jurisdiction is given to the District Judge. If the Court may review, it must be because of inherent power. The power of the commissioner of the issuance of a search warrant is equal to that of the District Judge. The power of each emanates from a common source. The Congress has the power 'to constitute tribunals inferior to the Supreme Court.' U. S. Constitution, Art. 1, Sec. 8, Clause 9; Art. 3, Sec. 1. The power to create implies the power to limit the jurisdiction. U. S. v. Hudson, 11 U. S. 32 (7 Cranch). The Federal Court is of limited jurisdiction, and has no power except such as is

expressly granted or necessarily implied. Turner v. Bank of N. A., 4 Dell. 9. Within this limitation it is a court of general jurisdiction. Toledo S. L. & W. R. Co. v. Peruchie, 205 Fed. 472. The District Courts have power to issue writs not especially provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principals of law. Comp. Stats., Sec. 1239. Rev. Stats. Sec. 716.

"Can a District Judge, without statutory authority 'agreeable to the usages and principles of law' by certiorari review a 'search warrant' proceeding of a United States Commissioner, who is given equal power by the Congress? If so, can one District Judge review the act of another District Judge in like manner? It is plain, however, that the Commissioner proceedings have not been concluded and that the relator has not exhausted his remedy before the Commissioner.

"The office and history of a United States Commissioner is clearly given by Judge Hough in U. S. v. Maresca, supra. While the Court has the right to issue the writ, In Re Chetwood, 165 U. S. at 462, Judge Hough in U. S. v. Maresca, supra, said:

" 'It does not follow that a certiorari must issue, and as against a magistrate exercising only arresting and committing powers it ought not to issue, and unless imposed by statute cannot issue under customary law, as is well and I think conclusively shown by Hagie, J., in Farrow v. Springer, 57 N. J. L. 353, (31 Atl. 215). There is no statutory imposition, in my opinion, it does not exist in this matter.'

"He also held that a United States Commissioner, under the present law, in issuing a search warrant exercised the powers of the District Court (10496¼-a, supra), and while so acting, 'was sitting in the District Court' and the law seems to so read. He also said at page 723:

" 'The view that this entire matter of issuing a search warrant and then directing the return of what was seized thereunder is a district court's proceeding, is confirmed by study of the nature and history of the case reported as Veeder v. United States, 252 Fed. 414' (certiorari refused 246 U. S. 675).

and that a writ of error would lie to the Circuit Court of Appeals from the Commissioner's act, and denied the motion to return property taken because the proceeding:

" '* * * was in the district court by a judicial officer, subordinate, but independent, sitting as a committing magistrate, having equal power with any Judge authorized to hold a District Court.'

"Judge Hand in U. S. v. Casino, 286 Fed. 976, at 979, after referring to U. S. v. Maresca, supra, held that the United States Commissioner, in issuing a search warrant, acted in a ministerial capacity, and the writ would be improper and at page 981 said:

" 'It is clear that certiorari, assuming that this court has power in a proper case to issue that writ (citing cases) is not necessary, and indeed, if the action of the commissioner be not judicial, the

common-law writ, which is all that could go in any event, would be improper.'

"The writ, if this Court has power to issue it, is not necessary, and in my opinion would be improper. Plaintiff relator has other adequate remedy.

"From any viewpoint of approach the petition must be denied."

In appellant's brief there is quite an extensive argument on the question whether the Commissioner exceeded his jurisdiction in issuing said search warrant. This question is not before the court for the reason that the Government entered a special appearance only for the purpose of objecting to the jurisdiction of the Court. Consequently, the merits of the case are not in issue. The proper remedy for the appellant in this case is on a motion to suppress, which rights he still has, and has not been denied them.

Respectfully submitted,

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